MOTION FILED
FEB 21 1985

No. 84-363

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

against

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and

BANK OF NEW ENGLAND CORPORATION,
CBT CORPORATION, HARTFORD NATIONAL
CORPORATION, THE COMMONWEALTH OF
MASSACHUSETTS, THE STATE OF CONNECTICUT and
BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION ON BEHALF OF THE DAVID F. BOLGER REVOCABLE TRUST FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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The David F. Bolger Revocable Trust hereby respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorneys

for the Petitioners Citicorp, Northeast Bancorp, Inc. and Union Trust Company has been obtained. The consent of the attorney for the Respondent The Federal Reserve Board has been obtained. The consent of the attorneys for the Intervenor-Respondent The Commonwealth of Massachusetts has been obtained. The consent of the attorneys for the Intervenor-Respondents The State of Connecticut, Bank of New England Corporation, CBT Corporation, Hartford National Corporation, and Bank of Boston Corporation was requested but refused.

The David F. Bolger Revocable Trust ("The Bolger Trust"), is a trust formed and existing under the laws of the State of New Jersey. The Bolger Trust is the owner of 107,300 shares or approximately 5% of all the outstanding common stock of RIHT Financial Corporation ("RIHT"). RIHT is a bank holding company within the meaning of Section 2(a)(1) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841 *et seq.* ("BHCA"), with its principal place of business in Rhode Island. On August 20, 1984, the Board of Governors of the Federal Reserve System approved the acquisition of RIHT by Bank of Boston Corporation ("BBC"), a bank holding company within the meaning of Section 2(a)(1) of the BHCA with its principal place of business in Massachusetts ("BBC-RIHT Merger"). The BBC-RIHT Merger is being effected pursuant to two reciprocal regionally restrictive banking statutes, Mass. Gen. Laws Ann. ch. 167A §2 ("The Massachusetts Act") and R.I. Pub. Law S. 0661 Sub A ("The Rhode Island Act").

The interest of The Bolger Trust in this case arises from the fact that it is a party to cases presently pending in the United States Court of Appeals for the First Circuit, *Michael Biszko, Jr., et al. vs. RIHT Financial Corp., et al.*, No. 84-1579, and in the United States Court of Appeals for the Second Circuit, *The David F. Bolger Revocable Trust vs. Board of Governors of the Federal Reserve System*, No. 84-4141, challenging the BBC-RIHT Merger. Those cases involve the same issue as is before

the Court in this case, namely, the constitutionality of a merger based on regionally restrictive interstate banking statutes. The Massachusetts Act, one of the statutes upon which the BBC-RIHT Merger is grounded, is being challenged in the instant case. BBC, the prospective acquiror in the BBC-RIHT Merger, is an Intervenor-Respondent in the instant case.

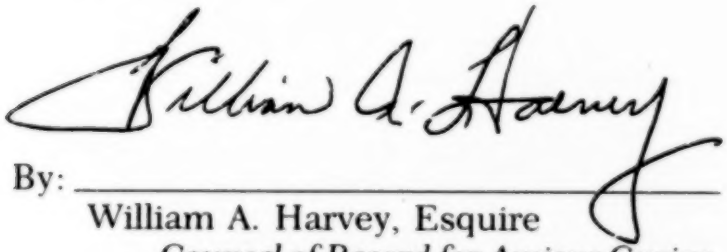
A substantial number of bank holding companies are public companies owned by large numbers of shareholders, such as the proposed *Amicus Curiae*, The Bolger Trust. The shareholders of those bank holding companies have interests unrepresented by the Petitioners, who represent only the interests of competing banks and bank holding companies. Indeed, the interest of the competing banking institutions is to penetrate and obtain a share of the market, not to maximize share values of potential targets. In fact, it is in an acquiring bank's best interest that the acquiree's stock price be depressed. The shareholders of targeted bank holding companies, on the other hand, seek to maximize the value of their investment and realize as high a price as possible for their stock. Accordingly, the interests of the *Amicus Curiae* are not identical to that of the Petitioners and are not well represented by the Petitioners' brief below.

The Bolger Trust seeks to demonstrate in its Brief that regionally restrictive interstate banking statutes harm the shareholders of bank holding companies, who would otherwise benefit from the opportunities afforded by non-discriminatory interstate banking. Specifically, the discriminatory interstate banking statutes affect the market value of the shareholders' property by limiting the attractiveness and value of their stock, by limiting the number of potential acquirors of bank holding companies thereby lessening competition and necessarily resulting in a lower acquisition price, and by limiting or impairing the ability of the bank holding companies to raise capital.

The Petitioners did not argue in the Court of Appeals the effect of the discriminatory interstate banking compacts on shareholders. Since it is likely that the Petitioners will pursue the same course in this Court, it is believed that the brief which the proposed *Amicus Curiae* is requesting permission to file will contain a more complete argument as it relates to shareholders. If this argument is accepted it would be dispositive of the case.

WHEREFORE, The David F. Bolger Revocable Trust respectfully requests leave of this Court to file the attached brief as an *Amicus Curiae*.

Respectfully submitted:



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INTEREST OF THE *AMICUS CURIAE*

The David F. Bolger Revocable Trust ("The Bolger Trust") is a trust formed and existing under the laws of the State of New Jersey. The Bolger Trust is the owner of a 107,300 shares or approximately 5% of all the outstanding common stock of RIHT Financial Corporation ("RIHT"). RIHT is a bank holding company within the meaning of Section 2(a)(1) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841, *et seq.* ("BHCA"), with its principal place of business in Rhode Island.

On August 20, 1984, the Board of Governors of the Federal Reserve System approved the acquisition of RIHT by Bank of Boston Corporation ("BBC"), a bank holding company within the meaning of Section 2(a)(1) of the BHCA, with its principal place of business in Massachusetts ("BBC-RIHT Merger"). The BBC-RIHT Merger is being effected pursuant to two reciprocal regionally restrictive banking statutes, Mass. Gen. Laws Ann. ch. 167(a) §2 ("The Massachusetts Act") (Pet. A101)[1] and R.I. Pub. Law S. 0661 Sub. A ("The Rhode Island Act") (Pet. A103). The Rhode Island Act took effect on July 1, 1984, and, from its effective date until July 1, 1986, permits only New England (i.e., Massachusetts, Maine, Rhode Island, New Hampshire, Connecticut or Vermont) bank holding companies to acquire Rhode Island banks, and only if the New England state in which the principal operations of the acquiring bank holding company are conducted has granted reciprocal rights to Rhode Island bank holding companies. Under the Rhode Island Act, and to the extent reciprocal provi-

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1. The Massachusetts Act, part of the New England Compact, is being challenged in the case before the Court as it authorizes the mergers of Bank of New England Corporation "BNE" and CBT Corporation "CBT", Hartford National Corporation "HNC" and Arltru Bancorporation, Inc. "Arltru", and Bank of Boston Corporation "BBC" and Colonial Bancorp, Inc. "Colonial".

sions have been enacted by other New England states, bank holding companies which have their principal places of business in and which are not owned by a company with its principal place of business outside of New England would be allowed to establish and/or acquire direct or indirect control of full service banks as defined in Section 2(c) of the BHCA in Rhode Island. Bank holding companies which are not based in New England are necessarily precluded from acquiring bank holding companies based in New England, such as RIHT.

The Rhode Island Act will, at least during the two year period between 1984 and 1986, be found to meet the reciprocity provisions of 1983 Conn. Act 83-411 ("Connecticut Act") (Pet. A97)[2] and the Massachusetts Act. Likewise, the Connecticut and Massachusetts Acts will be found to meet the reciprocity provisions of the Rhode Island Act. Significantly, the Rhode Island Act, unlike the Connecticut and Massachusetts Acts, authorizes complete reciprocal interstate banking in Rhode Island after July 1, 1986.

The Bolger Trust is vitally interested in the constitutional questions involved in the instant case as they relate to the regionally restrictive interstate banking statutes. Indeed, The Bolger Trust is a party to cases challenging the constitutionality of the BBC-RIHT Merger and the Rhode Island Act, presently pending in the United States Courts of Appeals for the First Circuit, *Michael Biszko, Jr., et al. v. RIHT Financial Corporation, et al.*, No. 84-1579, and in the United States Court of Appeals for the Second Circuit, *The David F. Bolger Revocable Trust v. Board of Governors of the Federal Reserve System*, No. 84-4141.

Shareholders of New England bank holding companies subject to regionally restrictive interstate banking

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2. The Connecticut Act, part of the New England Compact, is also being challenged in the case before the Court for the reasons set forth in footnote 1, *supra*.

statutes, such as The Bolger Trust, are injured by the irrational geographic limitations imposed by these statutes on non-New England banking institutions and companies, in ways separate and distinct from the harm claimed by banking institutions, such as Petitioner Citicorp, who are excluded from competition by the challenged Acts. Those excluded institutions are interested in penetrating and attaining a share of the New England market. In contrast, shareholders of targeted New England banking institutions seek to maximize the value of their investment and realize as high a price as possible for their stock.

The Massachusetts, Connecticut and Rhode Island Acts' insulation of New England banks from acquisition by non-New England banks directly harms shareholders, such as *Amicus Curiae,* by limiting the number of potential acquirors for targeted bank holding companies such as RIHT. This limitation on competition necessarily results in a lower acquisition price being paid by acquiring banks for New England bank stock than would be the case if there were no regional restrictions on competition. In reality, few New England banking institutions are financially able to acquire other New England bank holding companies. Therefore, the opportunity for acquisition afforded by the New England regionally restrictive statutes hardly creates a competitive situation. A non-New England institution may be interested in acquiring companies in Rhode Island as well as in Massachusetts and Connecticut, because of those states' proximity to one another or for business reasons that transcend geographical boundaries. A non-New England bank interested in merging with a New England bank is precluded from doing so by the challenged Acts. Absent the regionally restrictive provisions, the shareholders of New England banks would have more and better offers for their stock. A larger pool of potential acquirors would increase the value of a targeted New England bank's stock.

The discriminatory interstate banking statutes likewise harm shareholders such as *Amicus Curiae* by limiting or impairing the ability of New England bank holding companies to raise capital, thereby affecting and limiting the stock's value. A primary means by which a company, be it a bank or manufacturer, raises capital is through equity offerings. There exists only a finite amount of capital available for investment for which all companies compete. An investor, when choosing where to invest his capital, evaluates where, in the long or short run, he will realize the highest yield and/or the greatest appreciation. Clearly, in light of the recognized inevitability of full interstate banking (Pet. A150-161), the Massachusetts, Connecticut and Rhode Island Acts render New England bank holding companies less attractive to investors than other banking institutions which come to the market without restrictive geographic baggage. More capital investors would choose to invest in a banking institution which will be able to reap the benefits of full interstate banking rather than one, such as RIHT, which might be acquired under the imprimatur of the New England Compact prior to full interstate banking.

The challenged Acts' regional restrictions also impair the market value of the shareholders' property by lessening the attractiveness of their stock as an investment. As discussed above, the regional restraints impair a New England bank holding company's ability to raise capital and, because of the absence of substantial competition, to command receipt of the best possible acquisition price. Thus, the stock of a bank holding company unaffected by the restraints of the New England Compact will be a more attractive investment than stock of an affected company. The greater attractiveness impacts on the stock's market value. Moreover, the discriminatory regional restrictions weaken the resolve and ability of incumbent management to maximize the value of the shareholders' stock, to resist inadequate offers, and to at-

tain the best possible offer. Under the existing reciprocal legislative scheme, there are only a limited number of potential acquirors. Thus, a targeted bank subject to the New England Compact has limited options to fend off an unwanted tender offer. Were acquisitions not subject to regional restrictions, a wider universe of "white knights" would exist to which a targeted bank could turn to maximize the amount to be received for the company's stock.

For the reasons set forth above, *Amicus Curiae* is affected by the regionally restrictive Massachusetts, Connecticut and Rhode Island Acts, in a manner separate and distinct from Petitioners. Accordingly, *Amicus Curiae* believes it is in a position to bring to the Court's attention added insight, which will enable the Court to find that the regionally restrictive interstate banking statutes are unconstitutional.

ARGUMENT

I. The Massachusetts and Connecticut Acts Violate the Commerce Clause

A. THE REGIONALLY RESTRICTIVE STATUTES CONSTITUTE AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States. . . ." U.S. Const., art. I, §8, cl.3. By implication, the Commerce Clause has been interpreted to limit the power of the states to interfere with or impose burdens on interstate commerce. *Western and Southern Life Insurance Company v. State Board of Equalization of California*, 451 U.S. 648, 652, 101 S.Ct. 2070, 2075 (1981). Absent congressional action authorizing a particular state regulation affecting interstate commerce, the courts may properly decide whether such a state regulation imposes improper burdens on interstate commerce. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, *reh. denied*, 450 U.S. 1027, 101 S.Ct. 1735 (1981); *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531 (1978). In evaluating the constitutionality of state legislation under the Commerce Clause, the central principle which underlies the Commerce Clause, namely the strong federal interest in preventing economic balkanization, must be considered. *Bacchus Imports, Ltd. v. Dias*, ____ U.S. ____, 104 S.Ct. 3049, 3058 (1984). That principle was articulated by the Court in *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1731 (1979), as follows:

> The few simple words of the Commerce Clause — 'The Congress shall have power . . . To regulate Commerce . . . among the several States . . .' — reflected a central concern of the framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed,

> the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

In *Hughes*, the Court cited to *H.P. Hood and Sons, Inc., v. Du Mond*, 336 U.S. 525, 537-538, 69 S.Ct. 657, 665 (1949), where it had said:

> This principle that our economic unit is the Nation, which alone has the gamet of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527, 55 S.Ct. 497, 502, 79 L.Ed. 1032, 101 A.L.R. 55, 'What is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation.'

So important is the principle that states are not "separable economic units" that there exists a virtual *per se* rule of unconstitutionality regarding any state statute which has simple economic protectionism rather than the safeguarding of the health and safety of a state's people as its goal. *Philadelphia v. New Jersey, supra*, 437 U.S. at 623-624, 98 S.Ct. at 2535; *H.P. Hood and Sons v. Du Mond, supra*, 336 U.S. at 538, 69 S.Ct. at 655; *Toomer v. Witsell*, 334 U.S. 385, 403-406, 68 S.Ct. 1156, 1165-1167 (1948); *Baldwin v. G.A.F. Seelig, supra*, 294 U.S. at 527, 55 S.Ct. at 502; *Buck v. Kuykendall*, 267 U.S. 307, 315-316, 45 S.Ct. 324, 325-326 (1925). A finding that state legislation constitutes economic protectionism may be made on the basis of discriminatory purpose, *see Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53, 97 S.Ct. 2434, 2446-47 (1977), or on the basis of discriminatory effect. *Bacchus Imports, Ltd. v. Dias, supra*, ____ U.S. at ____, 104

S.Ct. at 3055. Legislation has a discriminatory effect where it "overtly blocks the flow of interstate commerce at a state's borders." *Philadelphia v. New Jersey, supra,* 437 U.S. at 624, 98 S.Ct. at 2535, *citing Welton v. Missouri,* 91 U.S. 275 (1876); *Minnesota v. Clover Leaf Creamery Co., supra,* 449 U.S. at 471, n. 15, 101 S.Ct. at 727, n. 15.

A more flexible approach under the Commerce Clause is allowed only where legitimate state objectives are credibly advanced, there is no patent discrimination against interstate trade, and the effect on interstate commerce is incidental. *See Philadelphia v. New Jersey, supra,* 437 U.S. at 624, 98 S.Ct. at 2535. The more flexible test is articulated in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970) as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See, also, Hughes v. Oklahoma, supra, 441 U.S. at 331, 99 S.Ct. at 1733-34. Thus, only where the party averring the validity of a state law establishes some legitimate state purpose other than the protection of local business will the Court apply a balancing test, measuring whether some legitimate state purpose is served which outweighs the incidental interference with interstate commerce and whether some less burdensome alternative might not exist to accomplish the same purpose.

The Massachusetts, Connecticut, and Rhode Island Acts are economic protectionist measures. An examination of the states' purpose in enacting those Acts demonstrates that the states are not entitled to the flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. *See Bacchus Imports, Ltd. v. Dias, supra,* ____ U.S. at ____, 104 S.Ct. at 3055. The stated purpose of the New England legislatures was to block trade at their borders as to non-New England banking institutions, so as to enable Massachusetts, Connecticut, and Rhode Island banking institutions to grow and strengthen themselves on a regional basis before full interstate banking and competition with money center banks becomes a reality (Pet. A150-161). The Acts, in addition to their discriminatory purpose, have a discriminatory effect: preclusion of non-New England banking institutions, such as Petitioner Citicorp, from competing on an equal footing with other bank holding companies in the acquisition of Massachusetts, Connecticut and Rhode Island banks, and preclusion of stockholders of New England banking institutions, such as *Amicus Curiae* The Bolger Trust, from maximizing the value of their investment. This discriminatory effect is more than merely incidental. In fact, Respondent Board has conceded that, absent congressional authorization to the contrary, the statutes in question constitute the kind of burden on interstate commerce "of the type that would be found by the Courts to violate the Commerce Clause" (Pet. A58).

Moreover, neither the Acts nor their legislative history evidence a credible legitimate local public purpose such as the furtherance of the health or safety of the general citizens of Massachusetts, Connecticut, or Rhode Island. The New England legislatures gave no attention to the question of whether the interest of those states' citizens in the greatest variety of high quality banking services would best be served by regionally re-

strictive statutes.[3] No evidence has been offered to demonstrate that a Massachusetts bank holding company can better appreciate the needs of Connecticut citizens than could a New York bank holding company. As humorously but aptly stated by John D. Hawke, Jr.,[4] in the article, *Are State Laws Permitting Interstate Banking Constitutional?*, American Banker (Dec. 15, 1982), "A shared taste for milky clam chowder may not be sufficient to warrant discrimination against those favoring the tomato based variety." (Pet. A180). Indeed, it would appear that the many Connecticut citizens who work in New York would be better served by a New York bank holding company, in that they could handle their banking transactions through one institution both at their place of residence and their place of business. This fact was plainly recognized by economist and banking expert Carter H. Golembe, who said that "there would appear to be a much closer economic relationship between Connecticut and New York than between Connecticut and Massachusetts when it comes to local banking markets . . . ." (Pet. A219). The regionally restrictive statutes disqualify companies from acquiring or establishing Rhode Island, Connecticut and Massachusetts banks solely on the basis of the location of the principal place of business of the acquiring company or its parent company. The Acts premise entry into New England's banking markets not on specific determinations of whether a potential ac-

3. Other than giving lip service to the special concern exhibited by New England banks for New England citizens, the legislatures cite no credible examples to support that theory. Interestingly, while the New England legislatures recognize that full interstate banking already exists in their states as far as non-banking financial institutions are concerned (e.g. money market funds) (Pet. A154-155), they do not cite one example of any harm which non-New England financial service organizations have caused their citizens, or a lower level of service than that afforded by New England financial service organizations.

4. Mr. Hawke served as General Counsel to the Board of Governors of the Federal Reserve System from 1975-1978.

quisition will benefit local concerns, but rather on an intra-regional system of reciprocal trade privileges. The intent of the Acts is not to promote the availability of the most beneficial banking services for citizens of New England states, but rather to insulate local financial institutions, while disparately treating out-of-state banking institutions.

The Massachusetts, Connecticut and Rhode Island Acts' interference with interstate commerce injures not only banking institutions outside the protected geographic area, but also, as stated above, shareholders of bank holding companies in the protected geographic area. Like a rock dropped in a great pond, the interference has effects which ripple out from the scene of the splash itself, and touch and change everything and everyone caught up in the flow of commerce. No attention was given by the New England legislatures to the interests of shareholders in maximizing the value of their investment as opposed to the interests of incumbent managements in perpetuating their tenure.

The Acts in question are distinguishable from those statutes enacted in other states which permit restricted or conditional entry of out-of-state bank holding companies based on conditions, such as limitations on activities, number of offices and home office locations.[5] Some legitimate state purpose is evident from those statutes, i.e., gaining employment for local residents and tax revenues without seriously affecting competing local banking institutions. Delaware and the other states cited in footnote 5, *supra*, opened up their borders to credit card operations from every state of the Union, subject to conditions requiring, for instance, the maintenance of certain offices in certain locations or of a certain size. Those conditions, though creating a burden on interstate com-

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5. *See, e.g.*, Neb. Rev. Stat. §8-903 (Supp. 1983); Del. Code Ann. tit. 5, §803; Md. Fin. Inst. Code Ann. §5-901; S.D. Compiled Laws Ann. §§51-16-40 to 51-16-44 (Supp. 1984).

merce, do not create an unacceptable burden and neither favor nor preclude a particular region's bank holding companies from participating provided that they meet the otherwise reasonable conditions.

Respondents relied heavily in the court below upon the case of *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), which upheld a statute that afforded out-of-state bank holding companies already controlling two or more banks in Iowa and already having demonstrated their commitment to the community the right to expand and make additional acquisitions.[6] As the court in *Iowa Independent Bankers* said, it was "perfectly rational" for the Iowa legislature to decide to retroactively permit the entrance of an out-of-state bank holding company which had already "proven itself to be a positive force" in the state banking industry without at the same time opening the state up to "wholesale entry into the Iowa market" by out-of-state bank holding companies. *Id.*, 511 F.2d at 1294. That case is clearly distinguishable from the instant one where there exists no rational relationship between the welfare of the citizens of New England and the creation of a New England banking region.

If, indeed, the concern of the Massachusetts, Connecticut, and Rhode Island legislatures, in enacting the challenged Acts, was to protect their citizens and insure for them a high level of banking service, those concerns could have been addressed in a manner resulting in far less impact on interstate commerce. For instance, the states could require, as a condition to entry, that a certain amount or level of services be afforded to their citizens. The Board has admitted that concerns over the influence of large banking entities entering the New England market could have been less drastically addressed by statutes directed to the size of prospective

6. Iowa Code Ann. §524.1805.

out-of-state bank holding companies (Pet. A61). The Board itself noted that "it would appear that such statutes [as distinguished from those enacted by the other states discussed in footnote 5, *supra*, and accompanying text] might be viewed as imposing substantially less of a burden on commerce in the furtherance of legitimate state objectives than [the Connecticut Act, and, by implication, the Massachusetts Act] impose[s]." (Pet. A70).

The Massachusetts, Connecticut, and Rhode Island Acts are protectionist measures of the type which the Court addressed in the analogous case of *Lewis v. BT Investment Managers*, 447 U.S. 27, 100 S.Ct. 2009 (1980). In *Lewis*, a Florida statute aimed at restricting the ability of out-of-state bank holding companies to compete in Florida's financial market, was found by the Court to "display a local favoritism or protectionism that significantly alters its Commerce Clause status." *Id.*, 447 U.S. at 42, 100 S.Ct. at 2018. This is precisely the kind of "simple economic protectionism" for which "a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey, supra*, 437 U.S. at 624, 98 S.Ct. at 2535. The Court did not feel the need to actually pronounce the similar activity in *Lewis* a *per se* violation only because it had already determined that the discriminatory treatment accorded out-of-state bank holding companies could not be justified under any less stringent test under the Commerce Clause. *Amicus Curiae* submits that the instant protectionist legislation warrants a *per se* finding of unconstitutionality.

B. THE DOUGLAS AMENDMENT DOES NOT AUTHORIZE THE MASSACHUSETTS AND CONNECTICUT ACTS

Because these regionally restrictive interstate banking statutes impermissibly burden interstate commerce, they can survive constitutional challenge only if there exists some grant of authority by Congress itself for their

enactment. Respondents, in an attempt to establish congressional authorization for the blatant violation of the Commerce Clause presented by the New England legislation, must demonstrate congressional intent that is obvious and unarguable. As the Court said in *South-Central Timber Development, Inc. v. Wunnicke*, ____ U.S. ____, ____, 104 S.Ct. 2237, 2242 (1984):

> [F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.

See, also, Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 102 S.Ct. 1096 (1982). Obvious and unmistakable congressional intent cannot be gleaned from vague legislative history. This Court has repeatedly warned of the dangers inherent in such unwarranted reliance on the fragile wisps of evidence regarding Congress' mind often found in legislative history. *See, e.g., New England Power Co. v. New Hampshire, supra; Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S.Ct. 926, *reh. denied*, 430 U.S. 976, 97 S.Ct. 1668 (1977).

In the instant case, Respondents contend that congressional authority for the regionally restrictive legislation is found in the Douglas Amendment to the BHCA, 12 U.S.C. §1842(d). However, they can point to no "unmistakably clear" language anywhere, and certainly not in the Douglas Amendment itself, to show an intention by Congress to authorize such protectionist state legislation.

The Douglas Amendment does nothing more than provide that no bank holding company may acquire a bank in another state unless the acquisition of such a

bank "is specifically authorized by the statute laws of the State in which such bank is located. . . ." It does not constitute Congress' grant of authority to the states to irrationally discriminate against each other as they see fit.

The minimal legislative history available in connection with the Douglas Amendment, likewise, does not demonstrate any obvious and unarguable congressional intent in 1956 to sanction the kind by discriminatory and protectionist legislation now before the Court (Pet. A111-115). Only the wildest speculation regarding Congress' probable intentions could result in the conclusion that Congress ever contemplated the sort of regionally restrictive legislation embodied in the Massachusetts, Connecticut, and Rhode Island Acts. In fact, it is clear from the legislative history of the BHCA that it was intended to operate free of discrimination (Pet. A107-110).

The Respondents seek to avoid the force of *South-Central Timber Development, supra,* by emphasizing the fact that the Massachusetts and Connecticut Acts are within the literal terms of the Douglas Amendment, unlike the situation in *South-Central Timber* where the state sought to find authorization for its restrictive conduct by looking to federal policy in analogous areas (Brief for the Board Respondent in Opposition to Petition for Writ of Certiorari at P. 8; Brief of Intervenor-Respondents in Opposition to Petition for Writ of Certiorari at P. 21). Contrary to their assertion, the Douglas Amendment does not specifically authorize the Massachusetts, Connecticut, or Rhode Island legislatures to permit interstate bank acquisitions based on regional restrictions. If the Court were to find that the Douglas Amendement was a *carte blanche* grant by Congress to the states, it would also have to find that Congress granted authority to Illinois, California and New York, where many money center banks are located, to enact regionally restrictive statutes in support of each other and to the detriment of other states, such that they could not participate in the

megabank system the money center states could then construct. Clearly, such an intention cannot be found in the Douglas Amendment.

The Court, in *Lewis, supra*, recognized the very limited grant of authority contained in the Douglas Amendment when it said:

> The only authority granted to the States [by the Douglas Amendment] is the authority to create exceptions to this general prohibition [against interstate bank acquisitions], that is, to *permit* expansion of banking across state lines where it would otherwise be federally prohibited.

Id., 447 U.S. at 47, 100 S.Ct. at 2021 (emphasis by the Court). The cases of *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, supra*, and *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1708 (1984), discussing *Iowa Independent Bankers* in *dicta*, relied upon below by Respondents, do not support the proposition that the Douglas Amendment authorizes discrimination against out-of-state bank holding companies based upon their geographic locations.[7] The court in *Iowa Independent Bankers* only needed to decide and only did decide that the Douglas Amendment did not prohibit states from chosing an alternative to an all-or-nothing approach to interstate bank acquisitions. It did not decide that the Douglas Amendment, in some positive sense, authorized alternatives which were overtly protectionist.

Likewise, Respondents cannot find support for their interpretation of the Douglas Amendment in the existence of the state legislation permitting the restricted or

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7. The Circuit Court for the District of Columbia in *Iowa Independent Bankers* considered the Douglas Amendment in connection with a claim under the Equal Protection Clause, which, in the absence of a suspect classification, accomodates a more liberal standard of review than the Commerce Clause.

conditional entry of out-of-state bank holding companies discussed above in footnote 5, *supra,* and accompanying text. Those conditional statutes clearly attempt to serve valid state interests such as employment of local residents, commitment to the local community, and the generation of tax revenue and do not grant geographic favors to one outside state over another. They can pass constitutional muster under an ordinary Commerce Clause analysis without authorization by the Douglas Amendment. The Massachusetts, Connecticut, and Rhode Island Acts cannot, as the regional restrictions contained therein bear no reasonable relation to acceptable local concerns. Rather, the New England legislation serves only to create an absolute geographic barrier to economic participation in the New England banking industry. Thus, the existence of other conditional statutes provides no support for the proposition that Congress intended to authorize regionally restrictive acts by its passage of the Douglas Amendment.

Accordingly, the regionally restrictive conditions attached to the Massachusetts, Connecticut, and Rhode Island legislatures' grant of authority to acquire an in-state bank must survive an analysis under the general principles of the Commerce Clause, on its own terms and without any help from the Douglas Amendment. As is plainly demonstrated above, the New England Acts fail to survive such a test.

II. The Massachusetts and Connecticut Acts Violate the Compact Clause

The Massachusetts and Connecticut Acts, in addition to violating the Commerce Clause, constitute an impermissible attempt by the New England states to "enter into [an] Agreement or Compact with another State . . . " carried out "without the Consent of Congress . . . " U.S. Const. art. I, §10, cl. 3. Indeed, the history of the Acts, and of the meetings and discussions which preceeded their passage, establish, and the Respondent Board and

the Court of Appeals for the Second Circuit have found, that the Acts represent an "agreement" or "compact" to create a regional banking zone. *See*, Pet. A51; *Northeast Bancorp., Inc. v. Board of Governors of the Federal Reserve System*, 740 F.2d 203, 209 (2d Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S.Ct. 776 (1985).

While not every agreement or compact lacking Congress' consent is violative of the Compact Clause, it is well settled that those "agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States' " are violative of the Compact Clause *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471, 98 S.Ct. 799, 812 (1978), *quoting New Hampshire v. Maine*, 426 U.S. 363, 369, 96 S.Ct. 2113, 2117 (1976), *quoting Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 734 (1893). The instant compact is so directed to a formation of a combination tending to increase the political powers of the states. It not only ignores significant federal interests in banking in general and interstate banking in particular, but also seeks to create an intermediate banking system which amounts to a political confederation inconsistent with notions of federal supremacy that harken back to the Constitutional Convention itself. No one has had the temerity to suggest that the Douglas Amendment constitutes the consent of Congress to such an agreement which is otherwise within the prohibition of the Compact Clause.

The blow dealt by this Compact Clause violation falls heavily not only upon competitors like Petitioner Citicorp, but upon the shareholders of New England bank holding companies like *Amicus Curiae* as well. The compact created by the New England legislatures, in ways more fully detailed above, deprives shareholders like *Amicus Curiae* of the full value of their shares by limiting the attractiveness of those shares as an investment, by limiting the number of potential acquirors of

the affected companies and thereby resulting in a lower selling price on the open market and by eroding the ability of New England bank holding companies in which such shares may be owned to secure new capital. Furthermore, from the standpoint of New England bank shareholders like *Amicus Curiae,* whose potential share values are eroded by the limitation on their marketability caused by the instant Acts, these Acts interfere with an additional federal interest, one clearly recognized as a fundamental part of the securities acts, namely the free and open marketability of shares held in public reporting companies such as those engaged in the instant mergers.

The sort of compacts or agreements which historically have been found acceptable under the Compact Clause are quite different from the instant compact. Those other compacts constituted laudable attempts by states to band together for purposes such as the control of pollution,[8] the fair allocation of water rights,[9] the management of a regional transportation system,[10] the construction and maintenance of bridges,[11] the promotion of uniformity and compatibility in state tax systems and the proper determination of state and local tax liability among multistate taxpayers,[12] and so on. Economic balkanization of the type described with fear by the Court in *Hughes v. Oklahoma, supra,* 441 U.S. at 325-26, 99 S.Ct. at 1737, and planned here by the New England states, is not a fit purpose for any compact or agreement.

While the law has entertained, throughout this nation's history, arguments in favor of "state's rights," it

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8. *State ex rel. Dyer v. Sims,* 341 U.S. 22, 71 S.Ct. 557 (1951).

9. *Texas v. New Mexico,* 462 U.S. 554, 103 S.Ct. 2558 (1983).

10. *Washington Metropolitan Area Transit Authority v. One Parcel of Land,* 706 F.2d 1312 (4th Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 238 (1983).

11. *Delaware River Joint Toll Bridge Comm. v. Colburn,* 310 U.S. 419, 60 S.Ct. 1039 (1940).

12. *United States Steel Corp. v. Multistate Tax Comm., supra.*

has never recognized the notion of regional rights accruing to groups of states. To allow the multi-state arrangement conceived of by the New England legislatures would operate to the detriment not only of the excluded states but to the federal government as well. Such an arrangement interferes with interstate commerce, undermines national economic goals, and constitutes an encroachment hostile to clearly recognized federal interests in interstate banking and in the free flow of interstate commerce itself. As such, the New England Compact stands in violation of the Compact Clause.

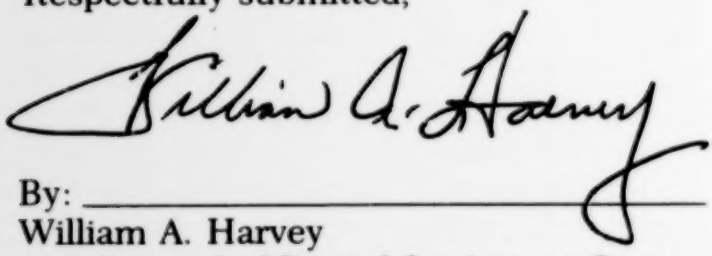
Even the Respondent Board recognized the highly complex nature of the whole issue of interstate banking and the potential danger that could result from dividing the nation into discrete banking regions (Pet. A47). As the Board said: "The Board believes that the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action." (Pet. A47-48). The proper course of action for the New England legislatures is a time-honored one: let the New England states form a compact and seek the approval of Congress. If there are legitimate regional interests to be served in restricting out-of-state bank acquisitions to specific regions, and a way of doing so without any challenge to federal supremacy, then let Congress be the judge and describe the parameters within which such a system might operate. In the absence of congressional consent, the instant Acts constitute an encroachment upon important federal interests that are plainly violative of the Compact Clause.

CONCLUSION

For the reasons argued more fully above, *Amicus Curiae* urges the Court to overturn the decision of the Court of Appeals for the Second Circuit and to find the Massachusetts and Connecticut Acts to be in violation of

the Commerce and Compact Clauses of the United States Constitution.

Respectfully submitted,



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CERTIFICATION OF SERVICE

I, William A. Harvey, counsel of record for the *Amicus Curiae* herein, hereby certify that all parties required to be served have been served in the following manner: that on the 21st day of February, 1985, I caused to be served three (3) copies of the attached Brief *Amicus Curiae* and the accompanying Motion for Leave to File *Amicus* Brief by first class mail, postage pre-paid, to the following:

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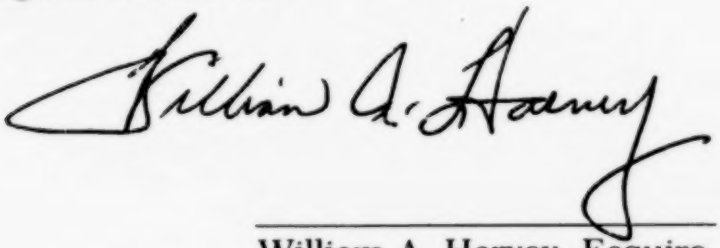

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